

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

RICK G. CULVER,
Plaintiff,
v.
QWEST COMMUNICATIONS CORPORA-
TION, a Delaware corporation,
QWEST CORPORATION, a Colorado
corporation, QWEST COMMUNICA-
TIONS INTERNATIONAL, INC., a
Delaware corporation; and JOHN
or JANE DOE;
Defendants.

No. CV-05-1720-HU

FINDINGS & RECOMMENDATION

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HUBEL, Magistrate Judge:

Plaintiff Rick Culver brings this action against his former

1 employer, Qwest¹, alleging that he was discriminated against
2 because of his age or in retaliation for filing a workers'
3 compensation claim. Defendants move for summary judgment. I
4 recommend that the motion be granted.

5 BACKGROUND

6 Plaintiff worked for Qwest, and its predecessors, from 1978
7 until his termination on August 1, 2003. Culver Depo. at pp. 7-8.
8 He worked as a Network Technician as part of the "construction
9 crew" with primary duties of splicing telephone cable to repair and
10 maintain the physical aspects of the telephone company. Id. at pp.
11 8, 14; Exh. 6 to Starr Oct. 13, 2006 Declr.

12 Plaintiff was based at defendant's Astoria garage. Ingraham
13 Depo. at p. 145. He reported to Construction Supervisor Mike
14 Ingraham. Id. at p. 27. Ingraham reported to Director of Network
15 Operations Julie Galey. Id.; Galey Depo. at pp. 19.

16 Plaintiff received a performance appraisal from Ingraham in
17 August 2002. Pltf's Exh. 10. The appraisal was generally
18 satisfactory. Id. However, Ingraham checked the box indicating
19 that plaintiff "often has difficulty working with others due to
20 inconsistent team effort." Id. He noted that plaintiff needed to
21 "work on his attitude," although he also remarked that plaintiff
22 "thinks of others at times." Id. In terms of his quality of work,
23

24 ¹ Plaintiff named three separate Qwest corporate entities
25 as defendants. On October 13, 2006, the parties stipulated to
26 the dismissal of Qwest Communications International, Inc. (dkt
27 #51). Two corporate entities remain as named defendants. The
28 motion is brought by all defendants but I refer to defendant in
the singular because it appears that plaintiff was employed by
only one of the two named corporations, but both remain in the
case at this point.

1 Ingraham noted that plaintiff met the standards on most jobs, had
2 few defects, but needed to attend "Basic Cable Splicing." Id.

3 On September 27, 2002, plaintiff was one of four technicians
4 observed together on a coffee break. Culver Depo. at p. 192.
5 Plaintiff, and one of the other three technicians, Gary Mayfield,
6 worked on the same crew reporting to Ingraham. Id. at p. 194;
7 Ingraham Depo. at p. 27; Exh. 9 to Starr Oct. 13, 2006 Declr. at p.
8 2. Ingraham orally reprimanded both plaintiff and Mayfield for
9 violating company policy on breaks and lunches. Culver Depo. at p.
10 190, 192, 193; Exh. 9 to Starr Oct. 13, 2006 Declr. at p. 2.
11 Plaintiff admits the other two technicians involved in the "coffee
12 break" incident were on a different crew and were not covered by
13 the same policy. Culver Depo. at pp. 193-94. As Culver explained,
14 he and Mayfield were covered by the Northwest Territories
15 Construction/Engineering Policies, but Bob Tierney and Russ Stewart
16 were not, because "[t]hey were installation and maintenance crew,
17 they were different." Id. at p. 193.

18 On both October 29, 2002, and October 30, 2002, Ingraham
19 witnessed plaintiff at a local restaurant, Arnie's Café, for an
20 extended break period. Exh. 10 to Starr Oct. 13, 2006 Declr. The
21 restaurant was not on plaintiff's direct route, and the breaks
22 exceeded the fifteen minutes plaintiff was allotted. Id.; Ingraham
23 Depo. at p. 185. Plaintiff was suspended for 1½ days without pay
24 for these violations of the break policy. Exh. 10 to Starr Oct.
25 13, 2006 Declr.

26 Plaintiff returned from the suspension on November 1, 2002,
27 and met with Ingraham and Galey who gave him a written warning of
28 dismissal for his conduct violations. Id. Plaintiff's union

1 representative Doug Iverson was present for the meeting. Culver
2 Depo. at p. 199. The written warning summarized his prior
3 discipline, including his past violations of the break policy, and
4 concluded:

5 Your failure to meet the expectation of the "Written
6 Warning" dated 9-9-2002 has now put your job in serious
7 jeopardy. This is considered disciplinary action. You
8 are not eligible to participate in the Upgrade and
9 Transfer Plan. If you fail to abide by this warning, or
10 if you fall below a satisfactory level in any other areas
11 of performance, you will face further disciplinary
12 action, up to and including dismissal. This document
13 will remain a part of your employment history and the
14 disciplinary action will be in effect for 24 months.

15 Exh. 10 to Starr Oct. 13, 2006 Declr. at p. 2.

16 Ingraham and Galey both signed the document. Id. The place
17 for plaintiff's signature indicates that he refused to sign it.
18 Id.

19 On June 27, 2003, about eight months after the November 1,
20 2002, written warning of dismissal, plaintiff's work assignment was
21 a cable splice project that included the 911 emergency circuit in
22 Seaside. Culver Depo. at pp. 78-79. His shift started at 7:00
23 a.m., in the Astoria garage. Exh. 9 to Starr Oct. 13, 2006 Declr.
24 He drove to Seaside, and completed his first task between 12:30
25 p.m. and 1:00 p.m. Id.; Culver Depo. at p. 147. Plaintiff then
26 took a thirty-minute lunch break at the Seaside Central office from
27 1:00 to 1:30 p.m. Culver Depo. at p. 147.

28 Plaintiff then determined he did not have enough time to set
up an "aerial work operation," and at 1:30, he drove to Astoria.
Id. at pp. 147-48. He decided to drive to the Astoria garage to
clean out his truck and restock it for the following week. Id. at
p. 148.

1 Plaintiff drove into the Astoria garage, but did not stop
2 there, and instead drove several blocks away to the Astoria Central
3 Office to pick up his paycheck. Culver Depo. at pp. 149, 170.
4 Plaintiff then drove to the Labor Temple Hall to see if a key he
5 had been given would open up a meeting room. Exh. 9 to Starr Oct.
6 13, 2006 Declr. Neither of these stops was work related. Id.

7 During the time plaintiff was driving to the Central Office
8 and the union hall in Astoria, the splice work he had performed
9 that morning in Seaside had failed, causing an outage in 911
10 service in Seaside. Id.; Culver Depo. at pp. 78-79. Management
11 immediately tried to reach plaintiff. Galey Depo. at p. 61;
12 Ingraham Depo. at pp. 146-47; Meisner Depo. at pp. 142-43.
13 Plaintiff was unreachable by pager and by cell phone. Id.; Culver
14 Depo. at p. 140. Plaintiff states that his pager was inoperable
15 because of Mike Meisner's failure to update a telephone number.
16 Id. His cell phone was charging on the dash of his truck. Culver
17 Depo. at pp. 142-43.

18 Culver was finally spotted by Sean McDonnell, Installation &
19 Maintenance Manager, at about 2:30 p.m. when he was leaving the
20 Labor Temple Hall. Exh. 9 to Starr Oct. 13, 2006 Declr. He was
21 informed about the problem with the 911 service and that it was in
22 his splice. Id. McDonnell sent plaintiff back to Seaside to help
23 other technicians working on the outage. Id. Plaintiff did not
24 arrive in Seaside until 3:05 p.m., and the repair was already
25 complete. Culver Depo. at p. 178. He assisted in the clean up and
26 then returned to the Astoria garage. Culver Depo. at pp. 184-85.

27 Plaintiff's time for that day was recorded as nine hours to a
28 single job code for splicing work in Seaside, consisting of one

1 hour of overtime, and eight hours of regular time. Culver Depo. at
2 210-11; Exh. 11 to Starr Oct. 13, 2006 Declr. Culver makes a point
3 of stating, repeatedly, that he himself did not fill out his
4 timesheet for the day at issue. Culver Depo. at p. 374. Rather,
5 he states that Meisner entered the time on that time sheet for June
6 27, 2003. Id. But, plaintiff testified in deposition that
7 plaintiff himself gave Meisner the information about the hours
8 plaintiff worked that day. Id. at p. 378. He stated that Meisner
9 asked him how many hours he worked that day and "so I told him nine
10 hours to the job; eight regular, one overtime." Id.

11 The date at issue, June 27, 2003, was a Friday. The following
12 Monday, plaintiff was questioned regarding the 911 outage and his
13 whereabouts on June 27, 2003. Exh. 16 to Starr Oct. 13, 2006
14 Declr.² Plaintiff, Ingraham, Mike Matney, and union representative
15 John Cerkam attended the meeting. Id. Ingraham asked plaintiff
16 about the work he performed on June 27, 2003, in Seaside. Id.
17 They discussed some technical aspects of the work and then
18 plaintiff explained that he drove to Astoria to the Central Office
19 to pick up his mail and to the Labor Temple Hall to see if a key
20 would open up a room. Id. He was asked why he had his mail
21 delivered to the central office and why he believed it was okay to
22 pick up his mail on company time. Id. He responded that he
23 believed it was "safer" and that it was okay to pick it up on
24 company time. Id. He was then told that if his job site was
25 Seaside, he was out of route. Id. Plaintiff's response was that
26

27 ² This exhibit appears to be the typewritten notes of the
28 June 30, 2007 meeting, including what appear to be some quotes
from the participants.

1 "they have done it forever at the coast." Id. Plaintiff also
2 agreed that instead of returning to Astoria, he should have stayed
3 in Seaside and worked longer in Seaside. Id.

4 Sometime between June 27, 2003, and August 1, 2003, Galey
5 reviewed plaintiff's timesheet for June 27, 2003. Galey Depo. at
6 p. 107. She concluded that the timesheet was fraudulent because
7 plaintiff reported nine hours of work and he did not work nine
8 hours. Id. She explained:

9 [Plaintiff] reported nine hours of time worked, which is
10 an hour overtime. After the 911 outage, we could not
11 find Mr. Culver. We later learned that he had driven
12 from Seaside to Astoria to pick up his mail, which is not
13 allowed on company time, and which takes a while to get
14 to Astoria, and he was not answering any of his calls,
15 and yet he still reported overtime. He was not on the
16 job.

17 Galey Depo. at p. 77.

18 After concluding that plaintiff had inaccurately reported his
19 work activities and time for June 27, 2003, Galey reviewed the
20 pertinent provisions of the Code of Conduct, including the
21 provision entitled "Safeguard Our Employees and Our Assets." Galey
22 Depo. at pp. 168-70; Exh. 15 to Starr Oct. 13, 2006 Declr. Galey
23 also consulted with Ingraham, Vice President Randy Hagedorn, and
24 labor relations representatives Sharlene Ayabe and Mike Lynch.
25 Galey Depo. at pp. 55-56.

26 Galey decided to terminate plaintiff's employment. Galey
27 Depo. at p. 140. Galey stated that "disciplinary action that was
28 taken over a period of time," was a cause that led up to this final
incident and that "[t]he reason for the actual termination was
safeguarding our employees and our assets or fraudulent time
reporting." Id.

1 Plaintiff states that Ingraham was a joint decision-maker with
2 Galey in making the termination decision. The evidence in the
3 record, however, is equivocal on this issue. Ingraham stated that
4 the termination decision was a "corporate decision." Ingraham
5 Depo. at p. 66. He was asked if he was referring to a decision-
6 maker on behalf of the corporation when he said "corporate
7 decision." Id. He answered, yes, and indicated that the decision-
8 maker was Galey. Id.

9 Ingraham then testified that the role of labor relations in
10 the termination process was to make sure all of the guidelines had
11 been followed and he was unsure if labor relations had a "vote," as
12 to whether an employee should be terminated. Id. In response to
13 the question of whether he recommended Culver's termination to
14 anyone, Ingraham stated "[t]hat was a joint collaboration." Id.
15 At a different point in his deposition, Ingraham stated in response
16 to the question of whether he recommended plaintiff's termination,
17 that "[t]hat was a joint decision." Ingraham Depo. at p. 61. In
18 response to the question of who was involved with the joint
19 decision, he stated himself, Galey, human resources, and Randy
20 Hagedorn. Id.

21 Galey testified that she discussed the matter with others, but
22 that she was the sole decision-maker. Galey Depo. at pp. 47-48.
23 When asked point blank, who made the decision to terminate
24 plaintiff, she stated "I did." Galey Depo. at p. 48 (Exh. 5 to
25 Bond Declr.). She stated that no one else was involved in the
26 termination decision-making process, but she explained that she did
27 run her decision by Hagedorn. Id. It also appears that labor
28 relations advised Galey as to whether her decision to terminate

1 would be upheld under the "just cause" termination standard of the
2 collective bargaining agreement. Ayabe Depo. at p. 37 (Exh. 17 to
3 Bond Declr.) (stating that Galey was the decision-maker, that human
4 resources and labor relations were not part of the decision-making
5 process, but were consulted on the just cause question).

6 Galey and Ingraham met with plaintiff on August 1, 2003, to
7 inform him that he was being terminated. Galey Depo. at p. 124.
8 A written letter to plaintiff, or perhaps a memorandum
9 memorializing the August 1, 2003 termination meeting, stated that
10 based on the investigation results of the June 27, 2003 incident,
11 plaintiff was terminated effective August 1, 2003. Exh. 9 to Starr
12 Oct. 13, 2006 Declr.

13 Plaintiff grieved his termination pursuant to the applicable
14 collective bargaining agreement and the grievance went to
15 arbitration. Culver Depo. at p. 316; Exh. 14 to Starr Oct. 13,
16 2006 Declr. The arbitrator concluded that discipline for the
17 events of June 27, 2003, was warranted because plaintiff "misused
18 Company assets in that he was non-productive for at least 1½ hours;
19 he incorrectly completed his time card for that day; and he was out
20 of Company reach from approximately noon to 2:29 p.m. on that day."
21 Exh. 14 to Starr Oct. 13, 2006 Declr. The arbitrator also
22 concluded that although plaintiff's twenty-three year good work
23 history was a mitigating consideration, he had sufficient notice
24 that his future with the company was in jeopardy and he was "far
25 along in the chain of progressive discipline[.]" Id.

26 A. Additional Facts Pertinent to Age Discrimination Claim

27 Plaintiff notes that at the post-termination arbitration
28 hearing, Ingraham stated that plaintiff should "lead by example,"

1 and that Qwest was a "faster company now." Culver Depo. at pp.
2 116-17. However, plaintiff admits that at the hearing, Ingraham
3 never used words or phrases such as "older employee" or "older
4 worker" or "anything like that[.]" Culver Depo. at p. 119.

5 Plaintiff understood the "lead by example" comment to mean
6 that plaintiff, as an older worker, should lead the younger workers
7 and help them. Culver Depo. at p. 117. He understood the "faster
8 company now" comment as meaning that now that plaintiff, as the
9 slow guy, was gone, Qwest was a faster company now. Id.

10 Plaintiff contends that Ingraham made comments in spring and
11 early summer 2002, more than one year before his termination and
12 approximately one year before June 27, 2003, about plaintiff being
13 the "old man," the "old man of the crew," and "old school," in
14 front of a crew. Culver Depo. at p. 115. He contends that the
15 crew then started using those terms. Id. The total number of
16 times such comments were made are alleged to be "[m]aybe half a
17 dozen[.]" Id. He states that Ingraham "initiated them, but then
18 the other crew members started repeating them occasionally in
19 jest." Id.

20 B. Additional Facts Pertinent to Workers' Comp
21 Discrimination Claim

22 On September 19, 2002, plaintiff suffered a one-inch cut to
23 his right hand while working. Culver Depo. at p. 96. The
24 accident/investigation report completed by plaintiff is dated both
25 September 24, 2002, and September 25, 2002. Exh. 7 to Starr Oct.
26 13, 2006 Declr. It is unclear exactly when plaintiff sought
27 treatment for the cut, but it does not seem to be disputed that
28 swelling did not begin until several days after the injury. Culver

1 Depo. at pp. 96-99. He was treated with some antibiotics and
2 released to return to work without restrictions. Culver Depo. 96-
3 99.

4 Page two of the accident investigation report has a section
5 entitled "action plan," in which plaintiff proposed for himself
6 that he "[s]low down[,] take more time to complete work operation[;
7 and] be more cautious[.]" Exh. 7 to Starr Oct. 13, 2006 Declr. at
8 p. 2. Plaintiff filled out the form in consultation with Ingraham,
9 but plaintiff admitted that he proposed the comments in this
10 section, and Ingraham indicated they were fine. Culver Depo. at p.
11 100-01.

12 No one made any derogatory comments about plaintiff's workers'
13 compensation injury during his employment. Culver Depo. at p. 91.
14 He made no complaint during his employment of any ill treatment or
15 retaliation for having filed this workers' compensation claim.
16 Culver Depo. at p. 61. Galey had no knowledge of plaintiff's
17 workers' compensation claim. Galey Depo. at p. 91.

18 STANDARDS

19 Summary judgment is appropriate if there is no genuine issue
20 of material fact and the moving party is entitled to judgment as a
21 matter of law. Fed. R. Civ. P. 56(c). The moving party bears the
22 initial responsibility of informing the court of the basis of its
23 motion, and identifying those portions of "'pleadings, depositions,
24 answers to interrogatories, and admissions on file, together with
25 the affidavits, if any,' which it believes demonstrate the absence
26 of a genuine issue of material fact." Celotex Corp. v. Catrett,
27 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

28 "If the moving party meets its initial burden of showing 'the

1 absence of a material and triable issue of fact,' 'the burden then
2 moves to the opposing party, who must present significant probative
3 evidence tending to support its claim or defense.'" Intel Corp. v.
4 Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991)
5 (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th
6 Cir. 1987)). The nonmoving party must go beyond the pleadings and
7 designate facts showing an issue for trial. Celotex, 477 U.S. at
8 322-23.

9 The substantive law governing a claim determines whether a
10 fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors
11 Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as
12 to the existence of a genuine issue of fact must be resolved
13 against the moving party. Matsushita Elec. Indus. Co. v. Zenith
14 Radio, 475 U.S. 574, 587 (1986). The court should view inferences
15 drawn from the facts in the light most favorable to the nonmoving
16 party. T.W. Elec. Serv., 809 F.2d at 630-31.

17 If the factual context makes the nonmoving party's claim as to
18 the existence of a material issue of fact implausible, that party
19 must come forward with more persuasive evidence to support his
20 claim than would otherwise be necessary. Id.; In re Agricultural
21 Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990);
22 California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics,
23 Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

24 DISCUSSION

25 Plaintiff's claims are brought under state law. The age
26 discrimination claim is brought pursuant to Oregon Revised Statute
27 § (O.R.S.) 659A.030 and the workers' compensation discrimination
28 claim is brought under O.R.S. 659A.040. In federal court,

1 employment discrimination claims brought pursuant to an Oregon
 2 statute are analyzed on summary judgment by using the familiar
 3 three-part burden-shifting analysis of McDonnell Douglas Corp. v.
 4 Green, 411 U.S. 792 (1973). Snead v. Metropolitan Prop. & Cas.
 5 Ins. Co., 237 F.3d 1080, 1091-93 (9th Cir. 2001) (applying federal
 6 McDonnell-Douglas burden-shifting standard to state employment
 7 discrimination claims when jurisdiction is based on diversity);
 8 Granville v. City of Portland, Nos. CV-02-1016-HA, CV-04-1295-HA,
 9 2005 WL 1113841, at *3 (D. Or. May 10, 2005) (citing Henderson v.
 10 Jantzen, Inc., 79 Or. App. 654, 719 P.2d 1322 (1986) for
 11 proposition that McDonnell Douglas prima facie case requirements
 12 apply to Oregon statutory discrimination claims).

13 The burden-shifting framework requires the plaintiff to first
 14 establish a prima facie case of unlawful discrimination followed by
 15 the defendant articulating a legitimate, nondiscriminatory reason
 16 for its action. McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1122
 17 n.16 (9th Cir. 2004). If the defendant does so, the plaintiff must
 18 show that the articulated reason is a pretext for discrimination.
 19 Id.; Aragon v. Republic Silver State Disposal, Inc., 292 F.3d 654,
 20 658-59 (9th Cir. 2002).

21 Standards used to analyze federal discrimination claims apply
 22 to Oregon employment discrimination claims. E.g., Conley v. City
 23 of Lincoln City, CV-02-216-AS, 2004 WL 948427, at *3 (D. Or. Apr.
 24 20, 2004) (citing cases for the proposition that Oregon courts
 25 consistently hold that case law developed by federal courts is used
 26 to interpret Chapter 659).

27 I. Prima Facie Case

28 To establish a prima facie case of age discrimination,

1 plaintiff must show that: (1) he is a member of a protected class;
2 (2) he was performing his job in a satisfactory manner; (3) he was
3 denied a term, condition, or benefit of employment; and (4)
4 similarly situated employees who are not members of the protected
5 class were treated more favorably in this regard. Scott v. Sears,
6 Roebuck & Co., 395 F. Supp. 2d 961, 973 (D. Or. 2005) (citing
7 McDonnell Douglas, 411 U.S. at 802). "In a claim alleging
8 discharge on the basis of age, the fourth element is sometimes
9 stated as requiring evidence that the plaintiff was 'replaced by a
10 substantially younger employee with equal or inferior
11 qualifications.'" Id. (quoting Nidds v. Schindler Elevator Corp.,
12 113 F.3d 912, 917 (9th Cir. 1997)).

13 The amount of evidence required to make out a prima facie case
14 is very little, and need not even rise to the level of a
15 preponderance of the evidence. Wallis v. J.R. Simplot Co., 26 F.3d
16 885, 888 (9th Cir. 1994).

17 Defendant contends that plaintiff cannot meet the second
18 requirement of demonstrating that he was satisfactorily performing
19 his job. Defendant relies on the fact, as detailed above, that
20 plaintiff was on a warning of dismissal for prior employer policy
21 violations at the time of his discharge.

22 In a discriminatory discharge case, the plaintiff must show
23 "he was performing his job well enough to rule out the possibility
24 that he was fired for inadequate job performance[.]" Pejic v.
25 Hughes Helicopters, Inc., 840 F.2d 667, 672 (9th Cir. 1988); see
26 also Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1062 n.8
27 (9th Cir. 2002) (remarking that it was uncertain if the plaintiff
28 had satisfied her burden on the satisfactory performance element of

1 the prima facie case, even with the low threshold of evidence
2 required to do so, because of the plaintiff's failure to follow a
3 particular safety procedure).

4 In a 2004 case, Judge King granted summary judgment against a
5 plaintiff who had brought both age and sex discrimination claims
6 under federal and state law, based on his conclusion that the
7 plaintiff had failed to show, as part of his prima facie case, that
8 he was performing his job satisfactorily. Spees v. Willamina Sch.
9 Dist. 30J, No. CV-03-1425-KI, 2004 WL 2370642, at *6 (D. Or. Oct.
10 19, 2004).

11 The Spees plaintiff was a twenty-six year teacher who argued
12 that isolated instances of discipline were inadequate to show that
13 he was not performing his job satisfactorily. Id. Judge King
14 rejected this argument:

15 I must agree with the District. There is evidence that
16 many parents would not allow their children to be in
17 Spees' class. His file contains several disciplinary
18 letters and several other yearly evaluations which
19 admonish Spees for his methods of discipline and
20 interaction with the students. The last straw was when
21 the [Teacher Standards & Practices Commission] suspended
22 Spees' license for 90 days because of misconduct. Spees'
23 termination followed shortly thereafter. There is also
24 no direct evidence of discrimination. I am mindful that
25 the prima facie case is a very low hurdle for a plaintiff
26 and is frequently conceded by a defendant. On this
27 evidentiary record, however, I conclude that Spees has
28 not raised a factual issue that he was performing his job
satisfactorily and thus, has failed to establish a prima
facie case.

23 Id.

24 Here, plaintiff contends that because defendant bases its
25 termination on plaintiff's falsification of his timesheet for June
26 27, 2003, and the evidence is that plaintiff himself did not fill
27 out his timesheet for that date, there is nothing unsatisfactory
28

1 about his performance. He complains that before his termination,
2 he was never given the opportunity to explain that Meisner, not
3 plaintiff, filled out his timesheet for June 27, 2003. Plaintiff
4 also notes that although he had been disciplined before June 27,
5 2003, he still had his job and was working full-time on June 27,
6 2003.

7 Plaintiff's arguments are without merit. First, as noted in
8 the factual recitation above, while Meisner may have been the
9 scrivener, the information provided to him for plaintiff's June 27,
10 2003 timesheet, came from plaintiff and thus, there is simply no
11 significance to the fact that plaintiff himself did not fill out
12 the timesheet.

13 Second, the question is not whether the incident which
14 allegedly triggered the termination establishes whether plaintiff
15 was performing his job satisfactorily or unsatisfactorily at the
16 time of that incident. The question is whether the incident
17 occurred against the backdrop of previously documented poor or
18 unsatisfactory performance.

19 Although plaintiff had received satisfactory job performance
20 evaluations in the past, with the most recent before the
21 termination occurring in August 2002, it is undisputed that these
22 evaluations preceded the written warning of dismissal which was
23 effective November 1, 2002, and which made clear that plaintiff's
24 job was in serious jeopardy for the following twenty-four months.
25 On June 27, 2003, the November 1, 2002 written dismissal warning
26 was in effect.

27 I agree with defendants that plaintiff fails to show, even
28 with the low threshold required, that as of June 27, 2003, he was

1 satisfactorily performing his job. As in Spees, plaintiff here was
2 a long-time employee, but one with a history of discipline. At the
3 time of his dismissal and the triggering incident, he was under a
4 written warning of dismissal. Plaintiff fails to establish a prima
5 facie case of discrimination. Even if plaintiff established his
6 prima facie case, however, I still recommend granting summary
7 judgment on the basis that he fails to demonstrate pretext.

8 II. Legitimate, Nondiscriminatory Reason

9 There is no serious dispute that defendant here articulates a
10 legitimate, nondiscriminatory reason for terminating plaintiff: he
11 reported nine hours of work for June 27, 2003, when defendant
12 concluded he did not work nine hours on that date. See Texas Dep't
13 of Comm. Affairs v. Burdine, 450 U.S. 248, 256 (1981) ("[T]he
14 employer's burden is satisfied if he simply explains what he has
15 done or produces evidence of legitimate nondiscriminatory
16 reasons.") (internal quotation omitted).

17 III. Pretext

18 Plaintiff can establish pretext in two ways: "(1) indirectly,
19 by showing that the employer's proffered explanation is 'unworthy
20 of credence' because it is internally inconsistent or otherwise not
21 believable, or (2) directly, by showing that unlawful
22 discrimination more likely motivated the employer." Chuang v.
23 University of Ca. Davis, Bd. of Trustees, 225 F.3d 1115, 1127 (9th
24 Cir. 2000). Plaintiff does not need to prove both at summary
25 judgment. To survive summary judgment, plaintiff is not required
26 to provide direct evidence of discriminatory intent as long as a
27 reasonable factfinder could conclude, based on plaintiff's prima
28 facie case and the factfinder's disbelief of defendant's reasons

1 for discharge, that discrimination was the real reason for
2 defendant's actions. Nidds, 113 F.3d at 918 n.2.

3 Additionally, plaintiff does not have to introduce additional,
4 independent evidence of discrimination at the pretext stage.
5 Chuang, 225 F.3d at 1127. Rather, "a disparate treatment plaintiff
6 can survive summary judgment without producing any evidence of
7 discrimination beyond that constituting his prima facie case, if
8 that evidence raises a genuine issue of material fact regarding the
9 truth of the employer's proffered reasons." Id.

10 A plaintiff is required to produce "very little" direct
11 evidence of an employer's discriminatory intent to move past
12 summary judgment. Id. at 1128. Direct evidence of discrimination
13 is "evidence, which, if believed, proves the fact of discriminatory
14 animus without inference or presumption." Godwin v. Hunt Wesson,
15 Inc., 150 F.3d 1217, 1221 (9th Cir. 1998) (internal quotation and
16 brackets omitted). Alternatively, the plaintiff may come forward
17 with circumstantial evidence that the employer's proffered reasons
18 were pretextual, but such circumstantial evidence must be
19 "specific" and "substantial" to create a triable issue of fact as
20 to whether the employer intended to discriminate. Id. at 1222.³

21 Circumstantial evidence "can take two forms." Coghlan v.
22

23
24 ³ But see Cornwell v. Electra Cent. Credit Un., 439 F.3d
25 1018, 1030-31 (9th Cir. 2006) (discussing whether post-Godwin
26 cases may have overturned the Godwin requirement that a
27 plaintiff's circumstantial evidence of pretext must be "specific
28 and "substantial," but not finally deciding the issue because the
evidence presented by the plaintiff was sufficient to create a
genuine issue of fact regarding the defendant's motive for its
actions under the Godwin specific and substantial standard in any
event).

1 American Seafoods Co. LLC, 413 F.3d 1090, 1095 (9th Cir. 2005).
2 The plaintiff can make an affirmative case that the employer is
3 biased by relying on statistical evidence. Id. Or, "the plaintiff
4 can make his case negatively, by showing the employer's proffered
5 explanation for the adverse action is 'unworthy of credence.'" Id.
6 (quoting Burdine, 450 U.S. at 256). As the Supreme Court explained
7 in Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147
8 (2000), "[p]roof that the defendant's explanation is unworthy of
9 credence is simply one form of circumstantial evidence that is
10 probative of intentional discrimination, and it may be quite
11 persuasive." Moreover, "a plaintiff's prima facie case, combined
12 with sufficient evidence to find that the employer's asserted
13 justification is false, may permit the trier of fact to conclude
14 that the employer unlawfully discriminated." Id. at 148.⁴

15 Plaintiff raises several pretext arguments which I discuss in
16 turn.

17 A. Shifting Reasons for Termination

18 As noted above, in deposition, Galey stated that the basis for
19 plaintiff's termination "was safeguarding our employees and our
20

21 ⁴ Although cases support defendant's argument that because
22 of the neutral arbitrator's decision in defendant's favor,
23 plaintiff faces an even higher burden of establishing evidence of
24 pretext, Collins v. New York City Transit Auth., 305 F.3d 113,
25 118-19 (2d Cir. 2002) (to survive motion for summary judgment,
26 Title VII plaintiff must present strong evidence that employer's
27 decision was wrong when a decision adverse to plaintiff has been
28 rendered by an independent tribunal); Smith v. United Parcel
Serv., No. C 03-04646 CRB, 2006 WL 733467, at *3 (N.D. Cal. Mar.
22, 2006) (arbitrator's decision in employer's favor "raises the
bar plaintiff must hurdle to show that the termination was a
pretext for race discrimination"), I need not apply that higher
burden in this case because even without a higher threshold,
plaintiff fails to establish pretext.

1 assets or fraudulent time reporting." Galey Depo. at p. 140.

2 Plaintiff argues that contradictory reasons offered by two
3 other employees of defendant after his termination show that
4 defendant's articulated reason is a pretext for discrimination. I
5 disagree.

6 First, in a December 9, 2003 written response to plaintiff's
7 union grievance from Labor Relations Manager Sharlene Ayabe to
8 Communication Workers of American Staff Representative Linda
9 Rasmussen, Ayabe first stated that "[t]he issue that gives rise to
10 this grievance is the termination of Rick Culver on August 1, 2003,
11 for violation of Qwest Code of Conduct, specifically 'Safeguard Our
12 Employees and Our Assets'/misuse of company time." Exh. 16 to Bond
13 Oct. 23, 2006 Declr. After reciting the events of the day on June
14 27, 2003, and noting plaintiff's past history of discipline, Ayabe
15 noted in her concluding remarks that "Mr. Culver was found in
16 violation of Qwest Code of Conduct for misuse of company time for
17 the incident of June 2[7]⁵, 2003 and was subsequently dismissed on
18 August 1, 2003." Id.

19 Second, in a September 27, 2004 letter written by defendant's
20 EEO Dispute Resolution Manager Mark Berumen to an investigator for
21 the Oregon Bureau of Labor and Industries (BOLI), Berumen stated
22 that plaintiff was terminated as a result of "falsification of his
23 time sheet. Nothing more, nothing less." Exh. 1 to Bond Oct. 23,
24 2006 Declr.

25 Plaintiff notes that Ayabe acknowledged, in response to
26

27 ⁵ There is no dispute that the original letter contains a
28 typographical error in the date.

1 questioning from plaintiff's counsel in her deposition, that the
2 reason Berumen asserted for the termination (falsifying time
3 sheets) appears different than the reason she gave (misuse of
4 company assets). Exh. 18 to Bond Oct. 23, 2006 Declr. (Ayabe Depo.
5 at p. 110). She did note that they are still both code of conduct
6 violations. Id.

7 Plaintiff sees some significance in the fact that in the
8 termination letter, Galey stated that plaintiff violated "Qwest
9 Code of Conduct, specifically 'Safeguard Our Employees and Our
10 Assets[,]'" Exh. 9 to Starr Oct. 6, 2006 Declr., while Berumen,
11 some thirteen months after the termination in a letter to BOLI,
12 stated that plaintiff was terminated for falsifying his time sheet,
13 which, according to plaintiff, is different than the "safeguarding
14 our assets" violation.

15 An employer's shifting explanations for its actions may give
16 rise to an inference of pretext. E.g., Washington v. Garrett, 10
17 F.3d 1421, 1434 (9th Cir. 1993) ("fundamentally different
18 justifications" for an employer's action give rise to a genuine
19 issue of fact with respect to pretext). However, when the reasons
20 articulated by the employer are not incompatible, they are not
21 considered sufficiently "shifting" to suggest pretext. Nidds, 113
22 F.3d at 918 ("the reasons given by [the employer] are not
23 incompatible, and therefore not properly described as 'shifting
24 reasons.'").

25 Even considering the evidence in a light most favorable to
26 plaintiff, defendant's reasons in this case have not shifted.
27 There is no question that Galey, Ayabe, and Berumen all articulated
28 that the basis for the termination was plaintiff's actions on June

1 27, 2003, of driving back to Astoria and checking his mail at the
2 central office and going to the union hall, and essentially,
3 performing non-company tasks and then claiming that he spent nine
4 hours working on that date. The essence of the problem was that he
5 was not on company time when he should have been, and then filled
6 out his timesheet as if he had been on company time the entire day.
7 The timesheet for June 27, 2003, showing nine hours of work in
8 Seaside for that day, was inaccurate. Defendant has never varied
9 from its position that those actions were the basis for the
10 discharge.

11 Galey was asked in her deposition whether she agreed with
12 Berumen's statement in his September 2004 letter that plaintiff was
13 terminated for falsification of his time sheet, nothing more,
14 nothing less. Exh. 3 to Bond Oct. 23, 2006 Declr. (Galey Depo. at
15 p. 153). She replied:

16 You know, I think -- I think we're really into semantics
17 here as far as falsification, fraudulent time recording,
18 misuse of company time. To me, they're all the same. So
19 I just want to make sure I clarify when we're talking
20 about that, we're all talking about the same thing. I
21 am. That's my understanding.

22 Was he -- he terminated based on fraudulent time
23 recording, misuse of company time or falsification of his
24 time sheet. To me, that's all the same thing. Yes, I
25 agree with that.

26 Id.

27 The reason has remained the same from the termination letter
28 through the litigation, even if the words used by the various
deposed employees to describe the basis for the termination have
varied somewhat. As a matter of law, I conclude that defendant has
not articulated inconsistent or fundamentally different reasons for
its termination of plaintiff and thus, plaintiff fails to create an

1 issue of pretext with this evidence.

2 B. Comments by Ingraham

3 As noted above, Ingraham made comments, more than one year
4 before plaintiff's discharge, about plaintiff being the "old man,"
5 the "old man of the crew," and "old school." Culver Depo. at p.
6 115. He contends that the crew then started using those terms.
7 Id. The total number of times such comments were made, by Ingraham
8 and the crew, are alleged to be "[m]aybe half a dozen[.]" Id.

9 Plaintiff argues that these comments are evidence of pretext
10 because they demonstrate that Ingraham is biased against plaintiff
11 because of plaintiff's age. He also adds that Ingraham made two
12 comments at the post-termination arbitration hearing which further
13 demonstrate Ingraham's bias. Those comments were that Qwest is a
14 faster company now and that plaintiff had to lead by example.

15 Putting aside the issue of whether Ingraham was a joint
16 decision-maker in the termination, and assuming for the purposes of
17 this motion that he was, the comments do not create an issue of
18 fact on pretext.

19 First, under Godwin and earlier cases, direct evidence of
20 discrimination is "evidence, which, if believed, proves the fact of
21 discriminatory animus without inference or presumption." Godwin,
22 150 F.3d at 1221 (internal quotation and brackets omitted). Here,
23 none of the evidence regarding Ingraham's alleged discriminatory
24 animus is direct. The comments made at the arbitration hearing do
25 not directly suggest, absent inference or presumption, that
26 Ingraham targeted plaintiff because of his age. They could easily
27 refer to the changes at the company, particularly the transition
28 from analog to digital communication, and to plaintiff's years of

1 service and thus, the need to lead by example.

2 The other comments similarly require an inference to conclude
3 that they are discriminatory, and thus, cannot be considered direct
4 evidence of discrimination. Statements such as "old man" and being
5 the "old man of the crew" are ambiguous and subject to differing
6 inferences and thus, do not prove the fact of discriminatory animus
7 without inference. While the comments could be references to an
8 employee's chronological age, they could also refer to employees
9 with longer tenure or to those who cling to outdated ideas.

10 Second, as the comments are not direct evidence, they must be
11 specific and substantial for plaintiff to meet his burden of
12 showing pretext by circumstantial evidence. Notably, none of the
13 "old man" type comments may be described as having been made in the
14 context of the termination decision. This has been an important
15 factor in previous Ninth Circuit cases.

16 In Nidds, an elevator service mechanic was laid off from his
17 job. Sometime in the year before his layoff, the district
18 supervisor had allegedly told another mechanic that he intended to
19 get rid of all the "old timers" because they would not "kiss my
20 ass." Nidds, 113 F.3d at 915. The court rejected the plaintiff's
21 argument that the "old timers" comment was sufficient to show
22 pretext. Id. at 917, 918-19. The court stated: "[the
23 supervisor's] comment was ambiguous because it could refer as well
24 to longtime employees or to employees who failed to follow
25 directions as to employees over 40." Id. at 919. The court
26 continued: "Moreover, the comment was not tied directly to [the
27 plaintiff's] layoff." Id.

28 The court compared the comment to one made in Nesbit v.

1 Pepsico, Inc., 994 F.2d 703, 705 (9th Cir. 1993). There, the
2 plaintiff's immediate supervisor had commented to the plaintiff
3 that "we don't necessarily like grey hair." The Nesbit court found
4 that the "comment was uttered in an ambivalent manner and was not
5 tied directly to [the plaintiff's] termination." Nesbit, 994 F.2d
6 at 705.

7 In a more recent case, the Ninth Circuit held that a comment
8 by the employer that it was looking for someone "young and
9 promotable" was insufficient to raise a question of fact as to
10 whether the reasons articulated for laying the plaintiff off were
11 pretexts for age discrimination. Coleman v. Quaker Oats Co., 232
12 F.3d 1271, 184-85 (9th Cir. 2000).

13 In Nidds, Nesbit, and Coleman, the court affirmed a grant of
14 summary judgment to the employer. Based on these cases, I conclude
15 that plaintiff fails to show that the evidence is specific and
16 substantial given that it consists of stray remarks, made one year
17 before the termination decision, which are ambiguous and
18 unconnected to the termination decision. Even if the statements
19 made post-termination at the arbitration hearing are as part of the
20 termination decision, they are not specific and substantial enough
21 to be considered circumstantial evidence of pretext.⁶

22
23 ⁶ There is also an allegation that Matney referred to
24 plaintiff as "slow." Pltf's Affid. at ¶ 32. Matney was a prior
25 supervisor of plaintiff's. However, the remark occurred in March
26 2003, a time when Matney was not plaintiff's supervisor. I do
27 not find the evidence worthy of discussion because there is no
28 evidence that Matney had any role in the termination decision and
the comment was not made when he was plaintiff's supervisor.
Even if it considered the comment along with the other evidence,
however, I would not change my conclusion because again, it is
not direct evidence as it could just as easily be a comment

1 C. Failure to Provide Complete Info to Ayabe

2 Ayabe was the human resources employee whom Galey consulted
3 regarding the termination decision to see if it comported with the
4 union contract's just cause standard. Ayabe also appears to have
5 represented defendant in the union grievance arbitration, or at
6 least provided defendant's written statement to the arbitrator.

7 Plaintiff makes an issue of the fact that at the time Galey
8 sought Ayabe's opinion regarding the just cause provision, Ayabe
9 apparently did not have certain information about plaintiff
10 including his August 2002 performance evaluation, and an April 3,
11 2003 letter from Randy Hagedorn congratulating plaintiff on twenty
12 five years of service. Exh. 9 to Bond Oct. 23, 2006 Declr.

13 One other document Ayabe apparently did not review in
14 connection with her pre-termination advice about the just cause
15 provision was an August 13, 2003 post-termination document entitled
16 "Release of Records." Exh. 15 to Bond Oct. 23, 2006 Declr. This
17 appears to have been generated by plaintiff's union and is a
18 request, signed by plaintiff, for a copy of all of his employment
19 records. Unidentified handwriting on the letter asks if the
20 records provided are "to include pager records and cell phone
21 records?" Id. Galey's handwritten response, dated August 13,
22 2003, states "pager records and phone records not available and not
23 applicable to this grievance or Rick's termination." Id.

24 It is undisputed that Ayabe's role was to evaluate whether
25 Galey's proposed termination met the just cause standard of the

26 _____
27 directed to plaintiff's pace of work as it could his age, and it
28 does not meet the specific and substantial standard, even
considered cumulatively with the other comments.

1 collective bargaining agreement. This litigation is not an appeal
2 of that process. The only relevance that process has to this
3 litigation is in raising the bar for plaintiff to show pretext, as
4 noted above. But, as explained in footnote four, I am not holding
5 plaintiff to that higher standard and thus, any information Ayabe
6 might have had to inform her decision that the termination would be
7 sustained in a union arbitration proceeding, has no bearing in this
8 litigation. The fact that Ayabe did not have the information does
9 not create an issue of pretext.

10 D. Adequate Training & Equipment

11 Plaintiff contends that evidence of disparate treatment is
12 seen by the fact that he did not receive the same equipment or
13 training as other employees. As I understand plaintiff's argument,
14 he states that with proper equipment and training there would have
15 been no 911 outage at Seaside on June 27, 2003, and he could have
16 continued working longer at the Seaside job site. As to the second
17 point, I understand plaintiff's reasoning to be that if he had
18 proper equipment and training, he would have finished his work on
19 June 27, 2003 earlier in the day and thus could have set up some
20 "aerial work" to complete his shift and would not have returned to
21 Astoria. Instead, he finished his work and then took lunch and in
22 his opinion, it was too late in the day to begin an "aerial"
23 project and thus, he drove back to Astoria.

24 The training he alleges he should have received is cable
25 splicing school in advanced circuits which plaintiff contends was
26 provided to his younger co-workers. But, the undisputed evidence
27 is that his need for such training was noted in his August 2002
28 performance evaluation, he was scheduled for it earlier in 2003,

1 but his own vacation plans prevented him from attending, and he was
2 rescheduled to take in on June 30, 2003. It was then canceled in
3 light of the events of June 27, 2003. Plaintiff fails to establish
4 that his age had anything to do with his failure to receive the
5 training.

6 The equipment he contends was received by younger co-workers
7 is a 965 DSP digital meter and a bucket truck. However, even
8 accepting that plaintiff did not receive this equipment when
9 younger co-workers did, the argument misses the mark.⁷

10 The problem with the argument is that even if the lack of
11 specified equipment and training hampered plaintiff in the
12 performance of his job on June 27, 2003, as he alleges, defendant
13 does not contend that plaintiff's actual performance of his
14 technical job duties on that date triggered his termination.
15 Rather, it was his decision to engage in personal errands and be
16 out of communication, followed by his claiming nine hours of work
17 time for the day, that defendant puts forth as the basis for its
18 decision. Thus, plaintiff's argument that if he had had proper
19

20 ⁷ Defendant argues that plaintiff cannot base his
21 discrimination claim on any act of defendant's occurring before
22 July 27, 2003, because that is one year before the date he filed
23 his BOLI claim. O.R.S. 659A.820, 659A.885. I do not view the
24 alleged training and equipment issues as independent, new claims,
25 but rather as background information relevant to determine
26 pretext. Thus, I do not agree with defendant that the equipment
27 and training issue is irrelevant to plaintiff's claim and I see
28 no reason to reject those allegations as time barred because they
are not being used as independent, separate claims. See RK
Ventures, Inc. v. City of Seattle, 307 F.3d 1045, 1062 (9th Cir.
2002) (even if acts outside the limitations period are time
barred and not actionable in and of themselves, "untimely claims
serve as relevant background evidence to put the timely claims in
context.") (internal quotation omitted).

1 equipment and training, which he contends was denied to him because
2 of his age, the 911 outage would not have occurred or he would not
3 have driven to Astoria, simply has no place in this pretext
4 discussion because the focus of defendant's termination decision
5 was not the outage, but rather was the fact that he engaged in
6 personal business while on duty and claimed nine hours of time for
7 the day.

8 Plaintiff's better argument is simply that defendant's
9 intentional discrimination is seen by the bare fact of not
10 providing the same equipment and training to plaintiff as it did to
11 its younger workers. While this argument is more on point to the
12 relevant issue, it still does not establish pretext on this record.

13 Plaintiff admitted in deposition that he was comfortable on
14 the ladder and had never asked for a bucket truck while employed.
15 Culver Depo. at p. 120-21. As to the 965 digital meter, plaintiff
16 admitted that he did not need that meter before the June 2003 work
17 he was doing on the 911 circuit in Seaside and he further admitted
18 that he did not communicate on June 27, 2003, that he needed the
19 965 DSP meter to adequately perform the "half tap removals."
20 Culver Depo. at p. 264. He did not ask for one because he had been
21 successful in doing the job with the older piece of equipment. Id.
22 at pp. 264-65. Provision of different, but adequate equipment, is
23 not specific and substantial evidence of pretext.

24 E. Timesheet

25 Plaintiff makes several statements in his memorandum in
26 opposition to the motion, suggesting that he contests the
27 underlying facts leading to his termination. For example, he
28 indicates that he was not actually out of route on June 27, 2003,

1 when he left Seaside and drove to Astoria. Pltff's Mem. at p. 17.

2 The law is clear, however, that "[i]n judging whether [the
3 employer's] proffered justifications were 'false,' it is not
4 important whether they were objectively false (e.g., whether [the
5 plaintiff] actually lied). Rather, courts only require that an
6 employer honestly believed its reason for its actions, even if its
7 reason is foolish or trivial or even baseless." Villiarimo, 281
8 F.3d at 1063 (internal quotation omitted); Smith, 2006 WL 733467,
9 at *4-5 (noting that "[e]ven assuming that plaintiff is correct
10 that he did not steal the packages, he still must show that
11 defendant's conclusion that he stole the packages was unreasonable
12 or false at the time the decision was made."); see also Young v.
13 Dillon Companies, Inc., 468 F.3d 1243, 1250 (10th Cir. 2006) ("the
14 relevant 'falsity' inquiry is whether the employer's stated reasons
15 were held in good faith at the time of the discharge, even if they
16 later prove to be untrue, or whether plaintiff can show that the
17 employer's explanation was so weak, implausible, inconsistent or
18 incoherent that a reasonable fact finder could conclude that it was
19 not an honestly held belief but rather was subterfuge for
20 discrimination"); Kariotis v. Navistar Int'l Transp. Corp., 131
21 F.3d 672, 677 (7th Cir. 1997) ("[A]rguing about the accuracy of the
22 employer's assessment is a distraction . . . because the question
23 is not whether the employer's reasons for a decision are right but
24 whether the employer's description of its reasons is honest")
25 (internal quotation, citation, and emphasis omitted); Jones v.
26 Gerwens, 874 F.2d 1534, 1540 (11th Cir. 1989) ("The law is clear
27 that even if a[n] [employee] did not in fact commit the violation
28 with which he is charged, an employer successfully rebuts any *prima*

1 *facie* case of disparate treatment by showing that it honestly
2 believed the employee committed the violation").

3 Plaintiff fails to create an issue of fact as to whether at
4 the time defendant discharged plaintiff, it did not hold an honest
5 belief that plaintiff had inappropriately left Seaside on June 27,
6 2003, had engaged in personal business in Astoria, and then caused
7 erroneous information to be put on his timesheet for that date.

8 F. Other Employee Comparators

9 In the briefing on the summary judgment motion, plaintiff
10 suggests that co-worker Rich Rasumussen engaged in similar conduct
11 of picking up his paycheck at the Astoria Central Office, including
12 on occasion on company time, without admonishment or discipline.
13 Exh. 38 to Bond Oct. 26, 2006 Declr. The problem with this
14 argument, however, is that first, Rasmussen is thirteen years older
15 than plaintiff and thus, cannot be used to show that younger
16 employees were treated more favorably.

17 Also, "[t]o identify a proper comparator, plaintiff must point
18 to individuals who have dealt with the same supervisor, have been
19 subject to the same standards, and engage in the same conduct
20 without any mitigating or distinguishing circumstances." Smith,
21 2006 WL 733467, at *6 (internal quotation omitted). Rasmussen was
22 in a different unit with a different supervisor. Pltf's Mem. at p.
23 29. Moreover, there is no evidence that he was on a warning of
24 dismissal when he picked up his paycheck at the Central Office, or
25 that he left a job site early to do so.

26 At oral argument, plaintiff disavowed his reliance on
27 Rasumussen as a comparator and indicated that he relied on
28 coworkers Mayfield and Rick Nunez to show that younger employees

1 were treated more favorably. He stated that Mayfield received a
2 bucket truck and a 956 digital meter. As noted above, however, the
3 fact that plaintiff received different, but adequate, equipment
4 does not create an issue of pretext.

5 As to Nunez, I allowed plaintiff to submit a post-hearing
6 memorandum citing to evidence in the record to show that Nunez was
7 a valid comparator. Plaintiff's post-hearing submission contains
8 two references to Nunez in plaintiff's memorandum of law, which is
9 not evidence. The only evidence cited is a paragraph in
10 plaintiff's affidavit which refers to the incident where Matney
11 asked plaintiff why he was slow and in response, plaintiff
12 explained that

13 The work load had taken longer than normal, yes.
14 However, the reason for taking longer was that I had
15 provided "ojt" (on the job training) to Rick Nunez, a
much younger, much less experienced construction unit co-
worker. Mr. Matney did not ask Mr. Nunez questions.

16 Pltff's Affid. at ¶ 32.

17 Nothing in this paragraph suggests that Nunez is a comparator
18 to plaintiff for the purposes of creating pretext by showing that
19 a similarly situated younger individual was treated differently by
20 plaintiff.

21 Thus, I recommend that defendants' motion as to the age
22 discrimination claim be granted because first, plaintiff fails to
23 establish a prima facie case by failing to show that he was
24 satisfactorily performing his job at the time of termination, or
25 alternatively, because he fails to create an issue of fact as to
26 pretext.

27 IV. Workers' Compensation Retaliation Claim

28 To establish a prima facie case of workers' compensation

1 retaliation in violation of O.R.S. 659A.040, plaintiff must show:
2 (1) that he invoked the workers' compensation system; (2) that he
3 was discriminated against in the tenure, terms, or conditions of
4 employment; and (3) that the employer discriminated against him in
5 the tenure or terms of employment because he invoked the workers'
6 compensation system. Kirkwood v. Western Hyway Oil Co., 204 Or.
7 App. 287, 293, 129 P.3d 726, 729 (2006). The third element
8 requires a showing of a causal link between a workers' compensation
9 injury and a discriminatory act. Olson v. ASI Staffing, Inc., No.
10 CV-04-1086-MO, 2005 WL 1839015, *3 (D. Or. Aug. 3, 2005).

11 It is undisputed that Galey had no knowledge of plaintiff's
12 workers' compensation claim. Thus, plaintiff can sustain this
13 claim only if Ingraham is assumed to be a joint decision-maker.
14 Even with this assumption, however, I recommend that defendants'
15 motion be granted.

16 The only argument plaintiff has in support of a showing of
17 causation is one based on timing. Timing alone can show causation.
18 E.g., Villiarimo, 281 F.3d at 1065 ("causation can be inferred from
19 timing alone where adverse employment action follows on the heels
20 of protected activity"). Plaintiff notes that his workers'
21 compensation claim was filed on or about September 25, 2002, and
22 that he received a written warning of dismissal in early November
23 2002, only about five weeks later.

24 The problem with this argument is that the adverse employment
25 action at issue in the case is the termination, which occurred in
26 August 2003, just over ten months after the workers' compensation
27 claim. Although there appears to be no Ninth Circuit case directly
28 on point for a ten-month period, in Villiarimo, where the court

1 rejected the plaintiff's argument that an eighteen-month period
2 between the protected activity and the termination established
3 causation, the court favorably cited cases holding that one year,
4 eight months, eight months, five months, and four months were too
5 long to support an inference of causation. Id. (citing cases from
6 the Seventh and Tenth Circuits). I conclude that a ten-month
7 period of time, by itself, does not create an issue of fact
8 regarding causation.

9 V. Motion to Amend

10 After the conclusion of briefing on the motion for summary
11 judgment, but before the oral argument on the motion, plaintiff
12 moved for leave to file a second amended complaint in which
13 plaintiff seeks to add a claim for punitive damages. At oral
14 argument, I granted defendants' request to delay responding to the
15 motion until after a ruling on the summary judgment motion. In
16 light of my recommendation that the summary judgment motion be
17 granted, I also recommend denying plaintiff's motion to amend as
18 moot.

19 CONCLUSION

20 I recommend granting defendants' motion for summary judgment
21 (#52). I recommend denying plaintiff's motion to amend (#66) as
22 moot.

23 SCHEDULING ORDER

24 The above Findings and Recommendation will be referred to a
25 United States District Judge for review. Objections, if any, are
26 due March 1, 2007. If no objections are filed, review of the
27 Findings and Recommendation will go under advisement on that date.

28 If objections are filed, a response to the objections is due

1 March 15, 2007, and the review of the Findings and Recommendation
2 will go under advisement on that date.

3 IT IS SO ORDERED.

4 Dated this 14th day of February, 2007.

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6
7 /s/ Dennis James Hubel
8 _____
Dennis James Hubel
United States Magistrate Judge
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